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Supreme Court, U.S.
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Case No. 04-120

IN THE
SUPREME COURT OF THE UNITED STATES

J.B. PARKER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. IS PETITIONER ENTITLED TO RELIEF ON HIS CLAIM THAT RING v. ARIZONA HAS IMPLICITLY OVERRULED CABANA v. BULLOCK WHEN THE ISSUE HAS NEVER BEEN RAISED IN STATE COURTS; AND FURTHERMORE, IT IS INAPPLICABLE HERE AS PETITIONER WAS FOUND TO BE THE ACTUAL SHOOTER.

II. IS PETITIONER ENTITLED TO RELIEF BASED ON CLAIM THAT POLICE INITIATED FURTHER CONTACT WITH HIM IN VIOLATION OF EDWARDS V. MOSELY WHEN THE FACTUAL FINDINGS OF THE STATE COURTS' CLEARLY DEMONSTRATE THAT PETITIONER INITIATED CONTACT WITH POLICE THEREBY MAKING HIS CONFESSION CONSTITUTIONALLY SOUND

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OPINION BELOW

The opinion below has been reported as Parker v. State, 873 So.2d 270 (Fla. 2004).

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1257. Although this is the appropriate provision, the requirements of same have not been met.

STATEMENT OF THE CASE

The Florida Supreme Court entered its opinion on January 22, 2004. A motion for rehearing was denied on April 28, 2004. Petitioner is now seeking certiorari review in this Court.

STATEMENT OF THE FACTS

Respondent rejects Petitioner's statement of the facts and will recount those facts that are germane to the issues raised below.

Regarding Issue I, the relevant facts are as follows. Georgeanne Williams testified that at the time of the murder she was dating John Earl Bush (T. Vol. 27 p. 1753). Williams testified that after Bush was arrested she visited him in jail and that on one occasion she spoke with Parker about the crime (T. Vol. 27 p. 1759). Parker confessed to her that he shot Francis Slater (T. Vol. 27 p. 1759-1761).

Terry Wayne Johnson testified that he was close with Parker while growing up because Johnson's sister had kids with Parker's brother (T. Vol. 28 p. 1903). Johnson testified that on the night Francis Slater was murdered, he was with Parker, Bush, and Cave (T. Vol. 28 p. 1908). Johnson testified that they went to the Lil General Store twice on that night (T. Vol. 28 p. 1912). Johnson testified that when they went back to the store the second time, Parker gave Cave the gun and when they came out of the store Cave held Francis at gun point and made her get in the car (T. Vol. 28 p. 1918). The record also reflects that Francis was frightened and she was begging for her life (T. Vol. 28 pp 1919-1922). Johnson testified that they drove to western Martin County and Bush got out of the car first, then Bush told Francis to get out (T. Vol. 28 p. 1924). Bush cut around the car and stabbed her. Cave had the gun at this time and Parker got out of the car, prior to shooting Francis, Parker told Cave to hand him the gun (T. Vol. 28 p. 1925). Johnson heard a shot but did not see who shot her (T. Vol. 28 p. 1925). Cave was in the car when Johnson heard the shot

(T. Vol. 28 p. 1926). Johnson testified that they split the money they stole from the Lil General Store (T. Vol. 28 p. 1932). Johnson said that after Francis was killed, Parker told Bush to throw the knife away and Bush threw it out the window (T. Vol. 28 p. 1928).

When upholding the aggravating factor of, "*capital felony* was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification", Section 921.141(5)(i) Fla. Stat. the trial court made the following factual findings in its sentencing order.

> The defendant carefully "cased" out the store two to three hours before the robbery. Upon returning to the store, Parker entered the store with Cave and Bush, all three actively participating in the robbery. None of the three defendants took steps to conceal their identity. Although the victim could have been secured in the store, the defendant's took her out to the car. There was no discussion among the defendants as to what they would do with her, her fate was a foregone conclusion. At the scene of the killing, Parker initiated her murder by reaching over and demanding the gun from Cave, stating, "hand me the gun". Parker later admitted to actually shooting the victim in the head. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification and is given great weight. (R. Vol. 7 p. 1331).

Regarding Issue II the following facts are relevant. The state and petitioner entered into a stipulation to establish the evidentiary record (SR. pp. 16-18).[1] Those facts are as follows.

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[1] The stipulated facts were garnered from the following sources. The initial motion to suppress hearing held in September 1982; an evidentiary hearing held pursuant to a motion for postconviction relief which was filed by Parker in

Parker initiated contact with Sheriff Holt on May 5, 1982 (SR pp. 24, 27, 313, 666). At the motion to suppress hearing held on September 3, 1982, Art Jackson testified that Parker asked to speak with the Sheriff (SR p. 25). Sheriff Holt testified that Art Jackson contacted him on May 5th, 1982 and indicated that Parker had requested to see him (SR. pp. 27-28). At the hearing in 1982, Lieutenant Powers ("Powers") testified that Captain Crowder told him to go and see Parker at the jail because he wanted to cooperate (SR p. 50). However, at his deposition, which was taken on July 21, 1982, Powers could not recall who told him that Parker had contacted someone at the sheriff's office and indicated that he wished to cooperate with the investigation (SR. p.625). In his affidavit filed on December 12, 2002, Powers clarified his responses and indicated that he had no personal knowledge as to how anybody knew that Parker wished to cooperate and that Captain Crowder did not instruct him to go to the jail on May 7, 1982 (SR p. 672). However, Powers clarified that the only two people who were superior to him in the chain of command were Captain Crowder and Sheriff Holt, therefore, Sheriff Holt must have given him the command (SR p. 672). Moreover, Powers has consistently testified that when he met with Parker at the jail, he had him sign a rights waiver form prior to touring the crime scene (SR. 50, 672). At the motion to suppress hearing in 1982, Powers testified that when he arrived at the jail, he asked Parker if he wished to cooperate (SR p. 50-51). Parker indicated that he wanted to cooperate, but first he wanted to call his mother (SR p. 51). Parker was allowed to call his mother (SR p. 51). After the telephone call Parker waived his rights (SR p. 53, 655). Parker signed a rights waiver form and agreed that Powers had advised him that he had a court appointed attorney who had advised him not to speak with members of the sheriff's department yet Parker wished to cooperate anyway (SR p. 655).

1987. The issue litigated at the evidentiary hearing was Parker's claim that trial counsel was ineffective for failing to argue as a ground for suppression of the May 7th statement that Parker had not initiated contact with police on that day.

Furthermore, at the February 1988 evidentiary hearing held on Parker's motion for post-conviction relief, Robert Makemson ("Makemson") testified about the 1982 motion to suppress. Makemson, who had been Parker's trial counsel, testified that he had met with Parker many times with respect to the motion to suppress, and Parker always indicated that he wanted to tell the Sheriff his side of the story because John Earl Bush was telling lies (SR p. 192-193, 404-406). During the evidentiary hearing, Makemson testified to the following in response to the state's questions:

> Q: Why didn't you call the Defendant to the stand and that's the allegation here that you were ineffective for not doing so to explain to the judge, "That I really wanted an attorney and that I had asked my mother and I really wanted the sheriff to come in just so I could get an attorney."?
>
> A: Because that was contrary to what Mr. Parker had told me about the statement. His [Parker's] position was and what he told me and he never changed the position was that he wanted to talk to the sheriff. He wanted to tell the Sheriff his side of the story.

(SR p. 195).

During cross examination by Parker, the following occurred:

> Q: That's–that's correct. Did you ask Mr. Parker why he changed his mind and then made a statement?
>
> A: Yes.
>
> Q: And what did he tell you?

> A: Because he wanted to tell the Sheriff that what John Bush was saying about him was a lie, it was not true. He wanted to tell the Sheriff what happened that night. He wanted to tell the Sheriff that what John Bush was saying was not true. And that is the very testimony that I did not want to have Judge Trowbridge hear.

(SR p. 406).

Additionally, Steve Green, the intern from the Public Defender's office, also testified at the same evidentiary hearing that Parker insisted on telling his side of the story (SR p. 234-241).

Parker testified at the 1988 evidentiary hearing held on his post-conviction motion. Parker stated that in May of 1982, he was brought to the Fort Pierce State Attorney's Office (SR p. 307-308). Parker said that a tape of John Bush was played wherein, Bush stated that Parker had stabbed Francis Slater (SR p. 309). At that time Parker told the Detective that he had nothing to say (SR p. 310). Parker voluntarily went to Martin County to take a lie detector test, when he and the Detective arrived Parker changed his mind and refused the lie detector and then he was arrested (SR p. 311). At the evidentiary hearing, Parker admitted that he asked Mr. Jackson to contact the Sheriff (SR p. 313). Parker testified that when Sheriff Holt arrived, he asked to make a phone call and the Sheriff took him to a small room (SR p. 315). Parker said that two other detectives arrived and also Steve Green (SR. p 315). Green informed Parker that he was representing him and he was from the public defender's office (SR p. 316). Green also told Parker not to say anything (SR p. 316).

During cross-examination by the state, Parker admitted that he was mad about the statement that Bush had made (SR. p. 329). Parker testified that he knew the importance of an attorney and that he did not recognize Steve Green as his attorney (SR p. 331, 333, 341). Parker also testified that on May 7th, Detective Powers came

to see him at the jail and Parker agreed to show him the road where they took Francis (SR p. 344). During the statement given on May 5th, Parker said he would be willing to show the police where he thought the knife was thrown (SR p. 493).

After reviewing all prior testimony, as well as memorandum of law,(SR pp. 692-707, 675-691), the trial court denied Parker's motion to suppress finding that Parker initiated contact with Detective Powers (SR pp. 709-715).

REASONS FOR DENYING THE WRIT

QUESTION I

PETITIONER'S CLAIM THAT RING V. ARIZONA HAS IMPLICITLY OVERRULED CABANA V. BULLOCK MUST BE SUMMARILY DISMISSED AS THE ISSUE HAS NEVER BEEN RAISED IN STATE COURTS; FURTHERMORE IT IS INAPPLICABLE HERE AS PETITIONER WAS FOUND TO BE THE ACTUAL SHOOTER

Parker is seeking certiorari review of the Florida Supreme Court's opinion on direct appeal following his re-sentencing. Herein Parker challenges the constitutionality of the sentencing procedure that resulted in imposition of the death penalty based on Ring v. Arizona, 536 U.S. 584 (2002), and Blakley v. Washington, 124 S.Ct.2531 (2004). His specific legal challenge is premised on the assumption that Ring has implicitly overruled Cabana v. Bullock, 474 U.S. 376 (1986). Therein, this Court held that the Sixth Amendment did not preclude an appellate court from making findings regarding a capital defendant's culpability, when it has been determined that the defendant was not the actual killer.

Factually this argument is premised on the following assertions: (1) Parker was found to be the non-triggerman, and (2)

an appellate court made the determination that his level of culpability in the murder of Frances Slatter met the requirements of Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987). Certiorari review must be denied.

First, the issue regarding the continued viability of Cabana in light of Ring was never presented to the state courts below, and therefore it is unexhausted. Second, Parker's factual assertions referenced above are not supported by the record. Summary denial is warranted.

Fatal to Parker's request for review is that at no time during the re-sentencing phase was there ever any consideration regarding the applicability of Enmund/Tison to this capital defendant. *A fortioari,* at no time was there any argument that Enmund/Tison findings should be made by the resentencing jury; at no time on direct appeal was there ever a challenge to Parker's sentencing procedure based on the continued validity of Cabana; and most importantly, at no time was the Florida Supreme Court ever asked to make or did the Court ever make any Enmund/Tison findings. Parker, 873 So. 2d 291-292. Because this claim was not raised below in any fashion, it is inappropriate for this Court to exercise certiorari jurisdiction. Adams v. Robertson, 520 U.S. 83 (1997); Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367 (1996) ("generally [we] do not address arguments that were not the basis for the decision below."); Holly Farms Corp. v. N.L.R.B., 517 U.S. 392 (1996); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989); City of Canton, Ohio v. Harris, 489 U.S. 378 (1989); Youakim v. Miller, 425 U.S. 231, 234 (1976); Cardinale v. Louisiana, 394 U.S. 437 (1969).

Also fatal to Parker's request for review is the fact that in this re-sentencing hearing, Parker was found to be the shooter of

the victim, Frances Slatter. The trial court specifically found in its sentencing order the following :

> The defendant carefully "cased" out the store two to three hours before the robbery. Upon returning to the store, Parker entered the store with Cave and Bush, all three actively participating in the robbery. None of the three defendants took steps to conceal their identity. Although the victim could have been secured in the store, the defendants took her out to the car. There was no discussion among the defendants as to what they would do with her, her fate was a foregone conclusion. At the scene of the killing Parker initiated her murder by reaching over and demanding the gun from Cave, stating, "Hand me the gun". Parker admitted later to actually shooting the victim in the head.

Parker v. State, 873 So. 2d 270, 288-289 (Fla. 2004)(emphasis added). When upholding the trial court's finding of the aggravating factor of "cold, calculated and premeditated", the Florida Supreme Court noted:

> The record supports the trial court's finding of CCP. The defendants deliberately armed themselves with a knife and gun, removed Slater from the store after the robbery, and then drove thirteen miles to a remote location where Parker asked for the gun and then shot Slater execution-style in the back of the head.

Id, at 289.(emphasis added) And when rejecting Parker's claim that his death sentence was not proportionate under Florida law, the Court again stated:

> Despite Parker's argument to the contrary, we conclude that he is equally as culpable as both

> Bush and Cave in Slater's murder. The evidence established that Parker gave Cave the gun before Parker, Cave, and Bush went into the convenience store, that Parker was an active participant in the robbery, and that Parker demanded the gun from Cave when they arrived at the deserted area with Slater. Finally, evidence was presented through Williams' testimony that Parker admitted committing the shooting.

Id, at 291-292.(emphasis added). Consequently the factual findings of both the trial court, as well as the Florida Supreme Court on direct review, obviated the necessity of any Enmund/Tison findings. Because the issue regarding Cabana's continued validity is not in any way germane to the outcome of this case, review is not warranted.

Lastly, Parker urges this Court to "settle" the issue regarding the continued validity of Cabana based on the conflicting opinions from an intermediate state appellate court and that of federal district court.[2] Because these cases do not involve a conflict among the circuit courts or a conflict among the states' highest courts, review is not warranted. Cf. Cyler v. Adams, 449 U.S. 433, 436 (1981)(explaining that certiorari was warranted because there was a conflict among the Courts of Appeal and the state courts); Dretke v. Haley, 124 S.Ct. 1847 (2004)(in accepting jurisdiction, the Court noted the "growing divergence of opinion in the Courts of Apppeal"); Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987)explaining that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review). Review must be denied.

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[2] Palmer v. Clarke, 293 F.Supp.2d 1011 (D.Neb. 2003)(finding that Ring v. Arizona is entitled to retroactive application in federal habeas litigation).

QUESTION II

THE FACTUAL FINDINGS OF THE STATE COURTS' THAT PETITIONER INITIATED CONTACT WITH POLICE THEREBY MAKING HIS CONFESSION CONSTITUTIONALLY SOUND IS SUPPORTED BY THE RECORD

Petitioner is alleging that the state courts' factual determination that he initiated further contact with police two days after he had invoked his right to counsel, was not supported by the record. Specifically, Parker complains that the evidence fails to show that he affirmatively initiated contact with law enforcement as required under Edwards v. Arizona, 451 U.S. 477 (1981) and Michigan v. Johnson, 476 U.S. 625 (1986). A review of the record relied upon by the trial court and the Florida Supreme Court will demonstrate that petitioner is incorrect and summary denial is warranted.

Prior to re-sentencing, a hearing was held on Parker's motion to suppress his May 7th statement. Therein the parties stipulated to the facts surrounding this issue.[3] It is apparent from that record there is competent substantial evidence to support the trial court's conclusion that Parker initiated the contact with Powers on May 7th, 1982. Here, after a complete review of the historical facts the trial court made the following finding:

> The facts show that after Defendant initiated contact with Lieutenant Powers, he was read his

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[3] As recounted in the Statement of Facts and Case, a motion to suppress was conducted back in 1982 prior to the guilt phase. In 1987, Parker filed a motion for postocnviction relief. Therein, Parker raised a claim of ineffective assistance of counsel for failing to challenge the May 7th statement. Parker alleged that he was approached by police on that day in violation of Edwards and Johnson. Because the relevant facts had been presented on two prior occasions, the parties agreed that no further evidentiary development was required.

> Miranda rights and that he understood them. He further acknowledged that the Public Defender had advised him not to speak with any member of the Sheriff's Department and that he was going to make a statement and cooperate of his own free will. The statement taken by Lieutenant Powers does not violate either the Fifth Amendment or the Sixth Amendment of the United States Constitution.

(SR p. 714).

Moreover, the record reflects that Powers was directed down to the jail by one of his supervisors, who advised him that Parker wished to cooperate (SR p. 50, 672). Powers went to the jail and asked Parker if he wanted to cooperate and Parker indicated that he did but first wanted to speak to his mother (SR p. 50, 625). Powers let Parker call his mother (SR p. 50, 625). After Parker spoke with his mother, he waived his rights. The written waiver contained the following statement:

> I have been advised by Lt. Powers that my court appointed attorney, the public Defender has advised me not to speak with members of the Sheriffs Dept ref my case. I wish to do so of my own volition and I wish to show Lt. Powers where I believe the knife which was used in the robbery/homicide may be located. This is done of my own free will and is voluntary.

(SR p. 655).

On direct appeal, Parker again citing to Edwards v. Arizona, 451 U.S. 477 (1981)and Michigan v. Jackson, 475 U.S. 625 (1986), challenged the legality of his May 7th statement. After reviewing the trial court's findings the Florida Supreme Court detailed the evidence as follows:

The stipulated record before the trial court contained conflicting evidence on whether Parker initiated the May 7 interview with Detective Powers. Parker stated through an affidavit that he did not initiate contact with the sheriff's office. Detective Powers stated, to the contrary, that he was directed by the sheriff's office to speak to Parker pursuant to Parker's request.

Although Parker asserts that Powers' testimony alone cannot be considered competent to establish that Parker initiated the May 7 interview because it is hearsay, Parker stipulated to the admissibility of this evidence and cannot now assert that the trial court was precluded from considering Powers' testimony in addressing the motion to suppress. See Laws v. State, 356 So. 2d 7, 8-9 (Fla. 4th DCA 1977) ("The general rule is that otherwise inadmissible evidence, received without objection, may properly be considered in determining the facts in issue."). Further, the trial court had before it the testimony of Parker's trial counsel and Steven Green, the intern sent from the Public Defender's office, which supports the trial court's finding. Parker's trial counsel testified that Parker had always represented, with respect to the May 5 interview, that he wanted to talk to the police to tell his side of the story and let the police know that what Bush was saying was not true. Green similarly testified that Parker insisted on talking with police on May 5, despite Green's advice not to do so. This additional evidence indicates that Parker was eager to communicate with police regarding Slater's murder. Thus, we conclude that the trial court's finding that Parker initiated the contact with law enforcement on May 7, 1982, is supported by competent, substantial evidence.

Parker v. State, 873 So. 2d 270, 280-281 (Fla. 2004). Simply because, Parker "wishes" that the state courts would have found his testimony more credible than that of the state's witnesses, is not a grounds for certiorari review. Based on the testimony of law enforcement and Parker's former attorneys, there was substantial competent evidence to support the state courts' findings. Cf. Jackson v. Virginia, 443 U.S. 307, 3432 (1979)(explaining in order to be entitled to federal relief whether on habeas review or on review of direct appeal, state court defendant must demonstrate that "no rational trier of fact" could have made the factual determination at issue); Parker v. Florida, 498 U.S. 308, 320 (1991) (requiring state defendant to demonstrate that the facts are not fairly supported by the record); see generally Stone v. Powell, 428 U.S. 465, 494 (1976)(explaining that a federal judge is in no better stead to make factual findings than a state court judge); Compare Miller-El v. Cockrell, 537 U.S. 322 (2003)(describing in detail the amount of evidence in contradiction to state's claim of no discrimination including unrefuted statistical evidence which supported a conclusion that the state's decision was not a reasonable determination of the facts). In conclusion, because the state courts' determination is supported by the record, certiorari review is not warranted.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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